

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Government,

HONORABLE GEORGE CARAM STEEH

v.

No. 15-20652

D-3 EUGENE FISHER,  
D-4 COREY BAILEY,  
D-6 ROBERT BROWN,  
D-10 DEVON PATTERSON,  
D-13 ARLANDIS SHY,  
D-19 KEITHON PORTER,

Defendants.

MOTION HEARING

Thursday, June 14, 2018

- - -

APPEARANCES:

For the Government:

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JUSTIN WECHSLER, ESQ.  
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On behalf of Eugene Fisher  
  
CRAIG DALY, ESQ.  
On behalf of Corey Bailey  
  
JAMES FEINBERG, ESQ.  
On behalf of Robert Brown  
  
MARK MAGIDSON, ESQ.  
On behalf of Arlandis Shy

STEVEN SCHARG, ESQ.  
On behalf of Keithon Porter

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1 Detroit, Michigan

2 Thursday, June 14, 2018

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5 **THE CLERK:** Case Number 15-20652, United  
6 States versus Billy Arnold, et al.

7 **THE COURT:** Good morning.

8 **MR. DALY:** Good morning, Judge.

9 **THE COURT:** Okay. We have several matters to  
10 address today. Sorry for the cramp quarters.

11 The first I think will be Mr. Fisher's motion to  
12 sever. Mr. Scharg?

13 **MR. H. SCHARG:** Yes, your Honor. Your Honor,  
14 Henry Scharg on behalf of Mr. Eugene Fisher.

15 We did file a motion to sever. The government has  
16 filed a response, and we filed a reply brief yesterday  
17 morning. I assume the Court --

18 **THE COURT:** I've seen it.

19 **MR. H. SCHARG:** -- seen everything. In terms  
20 of -- basically it's two arguments. The government says  
21 this is an untimely motion. A motion to sever is never  
22 untimely. It evolves around the circumstances of the  
23 trial, the dynamics of the trial. To say that we were  
24 untimely, and that it should have been filed earlier, I  
25 also pulled out the motion filed by Mr. Swor on behalf of

1 Mr. Robinson. That was filed May 14th. It was not  
2 opposed by the government. They never raised the  
3 timeliness issue. For them to come in and say that it  
4 wasn't filed on March 1st is very much a hollow issue  
5 because you have to be consistent in raising opposition,  
6 and in fact, when it comes to severance motions -- I mean,  
7 if you file early, the Court will say, let's wait and see  
8 what happens and how this plays out.

9 You can file it way before trial. You can file it  
10 right before trial. You can file it during trial. It  
11 depends on the circumstances of the case, and I did raise  
12 that motion periodically during this case. Every time --  
13 even before Mr. Swor started raising it when we were  
14 getting the groups together, we raised the issue that we  
15 did not want to be with this group, the death eligible  
16 individuals. When Mr. Swor raised the issue, we did so  
17 again, and even as late as several weeks ago, the day that  
18 Mr. Graveline gave notice and we had conference in  
19 chambers, I brought it up again at that point in time, and  
20 it's something that I have consistently raised as an  
21 issue.

22 The only problem is that it has become more  
23 prevalent as an issue here at this point in time. After  
24 the jury selection process where I saw that the government  
25 has strategically attempted to use Mr. Fisher -- use to

1 try to connect him to the other co-defendants in this  
2 case, constantly using the words "they" and "defense" when  
3 clearly that is in violation of the instructions that the  
4 Court is going to give the jury; that each -- that each  
5 defendant should be judged separately, that guilt or  
6 innocence is personal and individual, and the instruction  
7 reads on, it is your duty to separately consider the  
8 evidence against each defendant on each charge and return  
9 separate verdicts.

10 Based upon what happened from both sides of the  
11 table, both from the government and the defense, people  
12 were trying to treat my client as part of the defense, as  
13 part of the group at the table, and not to judge him  
14 separately. It became more obvious during the last  
15 several days of jury selection that my client would not be  
16 able to get a fair trial.

17 Ironically, he is Number 3 or the top individual  
18 on this indictment when, in fact, he is the least  
19 culpable. The only reason he's Number 3 is because  
20 originally way back when, the original charges were just  
21 for felon in possession, and for that reason he was  
22 charged with Mr. Arnold and Mr. Arthur in terms of the  
23 traffic stop of Mr. Arnold and Mr. Arthur back in  
24 September of 2015. He was high on that list, but, in  
25 fact, he is the least culpable and not involved in any

1 murders, robberies, attempted murders, et cetera, et  
2 cetera, and it's clear that is he is being grouped in here  
3 by the government because the government has suggested to  
4 the Court the groupings, it's strictly for spillover  
5 effect.

6 If, in fact, that you were going to sever him and  
7 he would have to have a separate trial from everyone else,  
8 you know, have a separate trial himself, I think there  
9 would be at least a more valid argument by the government.  
10 The fact is there is a number of other defendants that are  
11 more in line with the drug offenses, the nonviolent  
12 offenses, with the weapon offenses that Mr. Fisher is  
13 charged with, and it would be more in line and consistent  
14 with the charges -- in the offenses to group Mr. Fisher in  
15 with a later -- with a later group of defendants, and we  
16 know that there will be at least one or two other trials  
17 that will follow and are subsequent to this one.

18 Finally -- finally, there has been a lot of -- as  
19 I said in my reply brief, there has been a lot of -- we  
20 are concerned about the vocal and disruptive nature of  
21 several of the co-defendants in this case. That concerned  
22 us at the pretrial stage as Mr. Fisher and I sat at the  
23 table while other co-defendants were in the box. Some of  
24 the co-defendants were vocal and were disruptive, and we  
25 were concerned at that time, but we also thought that the

1 situation had been resolved. It has not. Even as late as  
2 last week, we saw certain types of behavior from the  
3 defendants -- defendants, each defendant, from that table  
4 that continued to concern us; that the -- not only had  
5 there been vocal and disruption during the pretrial, but  
6 the disruption and disrespect for the Court was not only  
7 diminishing, but getting greater, and it's more of a  
8 concern to Mr. Fisher's right to a fair trial.

9 For all -- and one other thing. I just want to  
10 make clear, there's three substantive counts regarding the  
11 May 10th non-fatal shooting on State Fair and Hoover.  
12 Those are Counts 24, 25 and 26 I believe, and the argument  
13 is -- 25, 26 and 27, and the argument is somewhat being  
14 made that well, it's just not the text messages and the  
15 postings which are really the overt acts in the RICO  
16 conspiracy that Mr. Fisher is being charged with, but we  
17 have these substantive acts, vicar acts of attempted  
18 murder, assault with a firearm in furtherance and use of a  
19 firearm. It sounds real serious.

20 The evidence regarding those three counts are that  
21 Mr. Arnold was in the area of the Lamont house, in that  
22 sector, which is, you know, a several mile sector; that he  
23 was in that area after the -- after the State Fair  
24 shooting. There's nothing else to tie -- there's nothing  
25 to tie Mr. Arnold into -- into Mr. Fisher's house.



1 There's nothing to tie Mr. Fisher into this. The only  
2 evidence regarding these three vicar counts is that at  
3 some point in time after the shooting, Mr. Arnold's phone  
4 bounced off a cell tower closest to the Lamont address,  
5 which they say was the stash house. That's the only  
6 evidence. It is the thinnest of thin evidence, and quite  
7 frankly, I'm pretty confident that won't survive a Rule 29  
8 motion at the end of the case, but it will linger on  
9 throughout the case.

10 And in fact, you may ask why, why was Mr. Fisher  
11 charged with those offenses, if, in fact, the only  
12 evidence was that the cell phone bounced off that cell  
13 tower that day. And the reason is because Agent Ruiz  
14 testified before a grand jury that on May 10th, the phone  
15 call was made from Eugene Fisher's house on Lamont, which  
16 as you recall from the government's expert on cell tower  
17 analysis cannot be determined.

18 It is our position that the only reason Mr. Fisher  
19 is charged with those counts is because Agent Ruiz who, as  
20 far as from my review, whose reputation, credibility and  
21 truthfulness maybe legendary, gave false testimony before  
22 a grand jury; that the -- that the -- that Billy Arnold  
23 made these phone calls from Mr. Fisher's house on Lamont  
24 after the shooting, which we know based upon the prior  
25 testimony, it's impossible to say that.

1           The only thing the cell tower expert could say was  
2           that when a phone -- a cell phone hits a tower, you don't  
3           know who's making the call, and you don't know the direct  
4           area -- you don't know where the call is being made from,  
5           but it's in the vicinity of the sector or the slice so it  
6           would probably was in that area, but nothing more.

7           For all of the reasons, we are asking this Court  
8           to sever Mr. Fisher from this trial group for the reason  
9           that there is a problem regarding fundamental fairness and  
10          his ability to get a fair trial being grouped with the  
11          present defendants and the offenses for which they are  
12          charged.

13                   **THE COURT:** All right. Thank you, Mr.  
14          Scharg.

15          Mr. Bilkovic?

16                   **MR. BILKOVIC:** Thank you, your Honor.

17          The first thing that I want to deal with is the  
18          comments that Mr. Scharg talked about, and the statement  
19          that he put in his reply brief where he indicates that it  
20          was not anticipated that this disrespectful banter,  
21          disruptive behavior and disrespect and lack of courtroom  
22          etiquette would continue as the trial began, but it  
23          appears there is not an end in sight.

24          Frankly, I don't know what he is talking about. I  
25          sat through three days of jury selection. I didn't see

1 it. None of the other government attorneys saw it. The  
2 Court at no time stopped proceedings because the Court was  
3 concerned about anything occurring.

4 So frankly, I don't know what he's talking about,  
5 but I certainly think if there is anything like that, the  
6 Court will make sure it polices that to make sure that  
7 behavior does not occur.

8 Moving onto his motion to sever where he is  
9 telling you that his client is the least culpable in this  
10 case, that's absolutely not true, notwithstanding the fact  
11 that a defendant is not entitled to severance because the  
12 proof is greater against a co-defendant. His client is  
13 charged with one of the attempted murders in aid of  
14 racketeering, and he tells you about a couple of facts,  
15 but he doesn't tell you about all the facts.

16 You look at Devon Patterson. He's charged with  
17 Counts 1 and 32, and that's it. Look at Mr. Fisher. He's  
18 charged with Counts 1 and 32. He's charged with Counts  
19 25, 26, 27, 33.

20 The day of the Mother's Day shooting, there was a  
21 call between Billy Arnold and Eugene Fisher prior to the  
22 shooting.

23 There's a video of Eugene Fisher that will be  
24 presented at trial where he's holding an assault rifle  
25 talking about going out on ops, going out on operations.

1           There is a conversation between Billy Arnold and  
2 Eugene Fisher via text message in the late evening of  
3 September 25, 2015 where Billy Arnold tells him that I  
4 need to come to your crib and grab my hookups. I'm coming  
5 to your crib to grab something. Be close.

6           Shortly thereafter, Billy Arnold gets into a high  
7 speed police chase, and the police recover the Bushmaster  
8 rifle that was used in multiple shootings.

9           Shortly after that, a couple of days later, Eugene  
10 Fisher posts a picture on Facebook with him and another  
11 gentleman, where one of them is holding an assault rifle,  
12 and Mr. Fisher just says -- or says, the feds just took my  
13 AR that my bro is holding.

14           This is a defendant that is charged with RICO  
15 violation in Count 32 along with all of the other  
16 defendants -- I'm sorry -- Count 1 with all of the other  
17 defendants, which means the evidence against him is going  
18 to be primarily the same as all of the other defendants.

19           There's absolutely no reason to sever him out of  
20 this case. He is not even close to being the least  
21 culpable. The evidence is basically in proving the RICO  
22 charge the same against him as it is against everybody  
23 else. Anything that he talks about with respect to the  
24 defendants, there's no prohibition when you have six  
25 defendants that are charged with one count of a RICO

1 violation to refer to them as the defendants.

2 I understand the jury will have to decide each one  
3 of the cases separately, and I think the jury is capable  
4 of doing that, but to tell the jury the defendants are  
5 charged with a RICO violation is a true statement. We  
6 weren't the only ones that did it. Defense counsel did it  
7 during their voir dire. There was no intentional design  
8 to bring specific attention to Mr. Fisher, and in fact,  
9 when Mr. Scharg was arguing this motion to you just now,  
10 he used the term "defendants" three different times.

11 So it's not being done by design to try to bring  
12 him into something that he is not part of. The Court has  
13 the ability through jury instructions throughout case,  
14 beginning of the case, middle of the case, and at the end  
15 of the case to make sure this jury knows, which I think  
16 this jury already knows after three days of jury  
17 selection, that they are to decide each defendant's case  
18 separately. I believe they are capable of doing that.

19 Based on the brief that the government submitted,  
20 there's absolutely no reason whatsoever to sever  
21 Mr. Fisher out of this case.

22 **THE COURT:** All right. Thank you.

23 **MR. H. SCHARG:** Judge, may I briefly?

24 **THE COURT:** Yes, a minute.

25 **MR. H. SCHARG:** I want to school the

1 government a little on the history of this case very  
2 briefly.

3 We had a pretrial several months ago down in Judge  
4 Tarnow's courtroom where a number of the defendants were  
5 very disrespectful to the Court with banter, and just  
6 acting out, where the defense lawyers were all -- where --  
7 where the marshals caucused with the defense lawyers --  
8 all of the defense lawyers to reprimand them about the  
9 behavior of their clients. I thought at that time that --  
10 I got the message, and I was hopeful that everyone -- and  
11 my client got the message, and we were hopeful that  
12 everybody got that message or memo.

13 It was apparent during this trial the other day --  
14 and Mr. Bilkovic was in the courtroom -- when one of the  
15 defendants had an outburst and referred to the Court as  
16 Steeh. Steeh. I'm not getting my meals on time. Steeh.

17 That's the disrespect and banter that I'm talking  
18 about which is consistent with what happened at the  
19 earlier proceeding, and -- and I've been in this case from  
20 the duration, and -- and what I'm saying about the  
21 concerns that I have regarding a continuation of this type  
22 of conduct which has nothing but negatively affected my  
23 client's right to have a fair trial. There's nothing that  
24 I saw before. There's nothing that I saw in the last  
25 couple of days that changed my mind or make me feel that

1 this banter and disrespect will not continue in this  
2 trial.

3 My client wants no part of it. I don't want any  
4 part of it. The concern is that it will spill over to my  
5 client. Any type of disrespect or banter created will  
6 have a spill over affect to my client, his right to have a  
7 fair trial.

8 The government, you know, again talked about the  
9 May 10th shooting and says well, there was a phone call,  
10 and when we say "there was a phone call", that means from  
11 the detailed call records it shows that there was a call  
12 made from Mr. Arnold to Mr. Fisher. It doesn't tell us  
13 the length of the call, whether the call was completed,  
14 because when you make a call and someone doesn't pick it,  
15 it is still recorded in that -- in those records as a  
16 call.

17 So there's no evidence that there was ever any --  
18 there's some evidence there was a call made, but there's  
19 nothing that there ever was a conversation or that the  
20 call was completed that we have.

21 The other testimony was text messages from  
22 Mr. Arthur regarding a hookup. There's no indication that  
23 Billy Arnold went to Mr. Fisher's home at night and picked  
24 up a gun. All there is is a text saying I need my hookup.

25 Pics in September or later in 2015, months after

1 the shooting has nothing to do with the shooting itself.  
2 This is all red herrings by the government.

3 When I say my client is the least culpable, he may  
4 not be the least culpable of the 21 defendants charged,  
5 but he's the least culpable of the people in this trial  
6 group, and it's for those reasons that we're asking the  
7 Court for the relief and severance.

8 **THE COURT:** All right. Thank you, Mr.  
9 Scharg.

10 The Court basically agrees with the position  
11 advocated by the government in this case, and I think it  
12 is important to clarify the timing question of this  
13 request for severance.

14 In the defendant's papers there was a reference to  
15 an oral motion that was made, and I think it was Mr.  
16 Scharg's recollection that the oral request for severance  
17 was made in either March or May, but indeed, the dates  
18 suggested were not accurate. The oral request by Mr.  
19 Scharg for severance was April 30, 2018, and at earlier  
20 hearings, both in March of 2015 and in May, May 22nd,  
21 the -- Mr. Scharg on behalf of his client was opposing the  
22 idea of severance.

23 Indeed, May 22nd, I believe we had an in chambers  
24 conference, and at that in chambers conference, Mr. Swor  
25 on behalf of Mr. Robinson pressed the written motion for



1 severance that he had filed, and the Court in chambers  
2 asked if any others were interested in severance because  
3 of the number of defendants that we had. The Court felt  
4 efficiency would dictate either the number that we have  
5 now or one less, and Mr. Swor, of course, did press his  
6 motion when we went back on the record, and Mr. Scharg did  
7 not, and I recall -- and I could be mistaken -- but I  
8 recall asking Mr. Scharg specifically that day in May  
9 whether his client was interested in severance, and I was  
10 told no, but all of that is kind of secondary any way to  
11 the arguments made here.

12 As it relates to misconduct on the part of the  
13 defendants, I think this was earlier in the case where  
14 there have been some episodes as described by Mr. Scharg  
15 that are less than desirable. We have no jurors at that  
16 point, and it's the Court's opinion that the behavior of  
17 the defendants during jury selection was fine. They know  
18 who the decision maker is apparently, and I don't -- I  
19 didn't consider their behavior disruptive in the least.

20 The one issue that we had with Mr. Patterson, the  
21 Court ended up concluding was not founded. The complaint  
22 that Mr. Patterson was making gestures was found to be not  
23 accurate, and I think it's logical to expect that the  
24 behavior by defendants during the trial is going to be as  
25 experienced with the jury selection process, and it was

1 fine.

2 So I think that concern on Mr. Fisher's part that  
3 the other co-defendants are going to misbehave and that  
4 would somehow prejudice his case is not a concern at all.

5 We have gone through jury selection. We have not  
6 sworn the jurors in. So I'm not concerned about jeopardy  
7 as it relates to Mr. Fisher, but Mr. Fisher participated  
8 in the jury selection process, and what am I to do if I  
9 were to grant this request? Am I going to have to  
10 consider starting all over again with jury selection? I  
11 don't think so, and yet, to the extent that he  
12 participated in that process, I think it is a legitimate  
13 question.

14 We have -- I was concerned about the room when I  
15 invited at this May 22nd date -- when I invited people to  
16 indicate if they wish the Court to consider severance, I  
17 was concerned about having a courtroom, period, much less  
18 a courtroom that would accommodate the number of  
19 co-defendants that we had as of that date, and I ended up  
20 getting one, and that was Mr. Swor who pressed his case,  
21 and at a minimum there was no request for severance as of  
22 that date by Mr. Scharg on behalf of Mr. Fisher.

23 So I think as it relates to his level of  
24 culpability, I don't know. In general, he's charged with  
25 furnishing weapons that were used in the commission of

1 murders and other serious violence, and I don't think that  
2 the seriousness or the culpability of the charges, if  
3 accurate, are of utmost seriousness and consequence.

4 So -- so I think for all of those reasons -- well  
5 in addition, we got -- this is my second trial under this  
6 indictment, and I've got -- I've got a number of  
7 defendants who are lined up for the next round, and I've  
8 got Mr. Arnold who will be tried separately, and a round  
9 to follow that presumably.

10 So it would be inefficient to add Mr. Fisher now  
11 to the next group up, which I think we already got seven  
12 defendants in that group. I'm not totally sure. It seems  
13 to me efficiency and fairness both dictate that the  
14 request be denied. So the Court will deny it.

15 **MR. H. SCHARG:** Very good, your Honor. I  
16 understand the Court's ruling. Therefore, I am asking the  
17 Court in its preliminary instructions to the jury on  
18 Monday to give 2.01(c), which is the instruction regarding  
19 separate consideration, which is the appropriate  
20 instruction that the Court will give at the end of the  
21 trial, but because of the concerns that I have, I'm  
22 requesting that instruction also be given --

23 **THE COURT:** I agree.

24 **MR. H. SCHARG:** Okay. And second of all, if  
25 either side, the government or co-counsel, make any

1 statements in front of the jury that's inconsistent with  
2 that, I will be standing up and objecting and asking for a  
3 cautionary instruction each time that happens.

4 **THE COURT:** Well, I'll think about that one.

5 **MR. H. SCHARG:** Okay.

6 **THE COURT:** All right. The next issue is the  
7 government's motion to exclude evidence or testimony  
8 concerning prior acquittals, and who will address that,  
9 Mr. Bilkovic?

10 **MR. BILKOVIC:** Thank you, your Honor. I will  
11 be brief I know the Court read the pleadings.

12 The government is asking for a ruling from the  
13 Court prohibiting any mention or reference to Corey  
14 Bailey's acquittal of one of the murder cases that we're  
15 going to present evidence on this case, the October 21,  
16 2009 Calloway murder, as well as recent Michael Rogers  
17 acquittal in the last trial.

18 I've cited to the Court the cases that are  
19 relevant on this issue, and basically those cases stand  
20 for the proposition that judgments of acquittal are almost  
21 always excluded because of the lack of relevancy because  
22 they are not proof of innocence, and the judgment of  
23 acquittal does not decide any facts of issue, but simply  
24 means the government failed to convince the jury beyond a  
25 reasonable doubt.

1           Judgments of acquittal have little, if any,  
2           probative value, and if the Court were to determine there  
3           was some probative value, case law is very clear that if  
4           the Court makes that determination under a 403 analysis,  
5           the danger of unfair prejudice or confusing the jury  
6           substantially outweighs any limited probative value those  
7           may have, especially with respect to the Corey Bailey  
8           acquittal where you have a different sovereign, different  
9           evidence. It's not like we're going to just simply  
10          present the transcripts of that trial where it's going to  
11          be identical. There are going to be differences.

12           With respect to the Michael Rogers acquittal, he  
13          was charged with different charges and had a different  
14          role allegedly than defendants in this case. Those  
15          defendants in this case are charged with involvement in  
16          shootings, including murders, and so the difference  
17          between these defendants and Mr. Rogers are substantial,  
18          and based on those reasons, and the reasons that I've  
19          cited in the government's motion, we would ask the Court  
20          to preclude any mention or reference to those acquittals.

21           **THE COURT:** Thank you, Mr. Bilkovic.

22           On behalf of the defendants, Mr. Daly?

23           **MR. DALY:** Yes. Thank you, Judge.

24           Judge, Craig Daly on behalf of Corey Bailey. Good  
25          morning.

1                   **THE COURT:** Good morning.

2                   **MR. DALY:** When I think about the  
3 government's motion I think it is closely tied to the  
4 question of the government's intent to introduce judgment  
5 of conviction, the proofs of some of the overt acts.

6                   We filed a motion to dismiss on the grounds that  
7 Mr. Bailey was acquitted of the Calloway murder. Your  
8 ruling was they were separate sovereigns, and that the  
9 government would be allowed to introduce evidence  
10 regarding the Calloway homicide. We're not opposed to the  
11 government introducing evidence based on your ruling.  
12 They are allowed to do that, and we will contest that  
13 evidence obviously, vigorously. So there's a difference  
14 between the question of evidence that the government seeks  
15 to introduce, and then the actual acquittal. So as I  
16 said, I think these are closely tied prior convictions and  
17 the acquittal.

18                   When I filed a motion in limine on my behalf  
19 seeking to exclude the judgments of conviction, not the  
20 evidence, but the actual judgments as evidence, what the  
21 government responded to was with a single case, and that's  
22 the Tocco case, T-o-c-c-o. The Tocco case is a mafia case  
23 that was tried here in the Eastern District, and when you  
24 read that case, what the Court said was that the prior  
25 convictions were convictions and judgments of convictions

1 of the co-defendants, not of Mr. Tocco, and what they said  
2 was Mr. Tocco had the opportunity to show to the jury that  
3 he, Mr. Tocco, was not involved with the crimes for which  
4 the judgments of convictions for the co-defendants had  
5 been entered, and they talked about the right of the  
6 defendant to a trial by jury.

7 So what I'm saying is that these two issues before  
8 you are closely related, and I think that you have to  
9 consider them together; in other words, is the government  
10 going to be allowed to prove an overt act only to a  
11 judgment of conviction, or should they be allowed to  
12 introduce evidence?

13 On the second matter, we cannot oppose it. You've  
14 ruled that they can introduce evidence. That's fine. Let  
15 them do that, but the judgment of conviction in itself is  
16 misleading. It's confusing to the jury. They maybe of  
17 the impression that since Mr. Bailey was convicted of the  
18 underlying offense and there was the judgment of  
19 conviction, that they don't have any say in the matter.

20 The flip side of it is the same thing. The  
21 government is trying to preclude a judgment of  
22 conviction -- of acquittal saying that Mr. Bailey went to  
23 trial in state court, and he was acquitted, and they are  
24 also trying to preclude evidence of the acquittal itself  
25 because we expect that there maybe witnesses who will come

1 and say oh, I testified in that trial -- prior case in  
2 state court, and it may come up that he was acquitted.

3 So I think these are closely linked together, and  
4 our position is evidence that -- of the underlying cases  
5 that the government wants to introduce is admissible, but  
6 the actual judgments are not, and if you consider them  
7 together, the prior convictions and the acquittals, I  
8 think that the fair result would be both should be  
9 excluded. Let the government introduce the evidence that  
10 they want. Let us contest the underlying evidence  
11 regarding all of the overt acts, and leave the question of  
12 judgments and acquittals in the state court out of this  
13 case because it is very misleading. It's very confusing  
14 to the jury.

15 **THE COURT:** All right. Thank you, Mr. Daly.

16 **MR. BILKOVIC:** Your Honor, in brief response,  
17 again, the problem is the law says that's what you do. It  
18 talks about the limited relevance, if any, of acquittals,  
19 but it talks about improving, especially the Tocco case,  
20 improving -- or has evidence proving an act that you can  
21 use, a prior conviction.

22 And the government's position at this point is  
23 we're not intending to use judgments of conviction, but if  
24 issues become contested, for example, we have a conviction  
25 where a defendant, such as Mr. Bailey, entered a guilty



1 plea where they laid out the factual basis of a conviction  
2 and there was a conviction entered, but yet, the defense  
3 at trial was he wasn't there. He was in another state.  
4 He had nothing to do with this. We certainly feel that we  
5 have the right to then bring that in.

6 But as a starting point, we don't plan at this  
7 point in our case in chief to use evidence of judgment of  
8 convictions to establish the predicate acts unless we're  
9 forced to based on a defense strategy. If based on the  
10 questioning, if we feel it is appropriate, we can approach  
11 the Court, have the Court make the determination, but  
12 right now we don't plan on using it, but I think under the  
13 Tocco case, if we want to establish it, we are entitled  
14 to.

15 **THE COURT:** All right. Okay. Thank you.

16 Based on the argument, both in the papers that  
17 have been filed with the Court, as well as orally today, I  
18 can certainly understand the argument by Mr. Daly that it  
19 doesn't appear to be fair if -- as it is one sided, and  
20 the issues are generally at least related to one another,  
21 but indeed, the relevance of an acquittal is quite  
22 different than the probative value of a conviction, and in  
23 light of the government's stated intention not to prove  
24 the fact of a conviction unless defense strategy would  
25 open that door, the Court has found the general discussion

1 of this issue and the ruling in U.S. versus Castro  
2 Ramirez, 461 Fed Appendix 467, 2012 decision written by  
3 Judge Sutton. The Court finds the reasoning persuasive.

4 There are references to Sixth Circuit opinions  
5 going back to as far as 1983 and 2002 that -- that would  
6 dictate granting the motion in limine filed by the  
7 government.

8 And so the Court grant that motion in limine.  
9 There is to be no references to the acquittals subject  
10 that is the subject to that motion.

11 All right. So the next matter to address is a  
12 motion in limine filed by Mr. Daly.

13 **MR. DALY:** Thank you, Judge.

14 What I want to begin with -- because we have  
15 addressed a number of different areas -- I think it is  
16 helpful to start with what the parties agree to.

17 There was an agreement regarding a specific rap  
18 video that we filed a motion in limine, and the rap video  
19 is referred to as OG HardWorkJig Sonny, and it may be  
20 Sonny Cocaine, and that is Government Proposed Exhibit 68.

21 What we raised was a Fifth Amendment argument  
22 because as part of his rap, Mr. Bailey says, quote, I kept  
23 silent. It was well worth it.

24 There is some other language that he used in that  
25 context too about the prior homicide that you just ruled

1 on, where he says I beat the murder. Not guilty was the  
2 damn verdict. You just ruled that can be excised, that  
3 that should not be a part of the case.

4 I just want to say at this point, the agreement,  
5 as I understand the government's position, is that the  
6 reference to, I kept silent. It was well worth it, will  
7 not be admitted, and that's the extent of the agreement.

8 So we have an agreement between the parties with  
9 regard to that, and then we have the Court's ruling that  
10 this other portion should excised, and I think that's an  
11 accurate representation of that particular issue that I  
12 raised. Is that a fair summary?

13 **MS. FINOCCHIARO:** Yes, your Honor.

14 **MR. DALY:** Okay. So there are a number of  
15 issues that I need to go through. This will take me some  
16 time, so I appreciate your patience.

17 What I want to start with is the government's  
18 attempt to use certain aliases that Mr. Bailey used down  
19 in West Virginia. There were three separate incidents all  
20 in Charleston, West Virginia, and they are contained in  
21 Overt Acts 66, 72 and 74, and on three separate dates, and  
22 dates respectfully are October 27, 2009, November 6, 2009  
23 and February 8, 2012.

24 So the government intends to use this information.  
25 They claim that this use of what they refer to as fake

1 names is part of the enterprise and conspiracy charge in  
2 Count 1.

3 What the government and the defense agrees to is  
4 what Sixth Circuit precedent is. What the law here in  
5 this circuit is that evidence of an alias is not to be  
6 used in an indictment or as evidence at trial. So it is  
7 disfavored, and that's the starting point, and the case  
8 law says there's one exception, and the one exception is  
9 is there a question of identification, and the question of  
10 identification could be raised in two contexts  
11 essentially.

12 One is the defense could say well, when Mr. Bailey  
13 was down in West Virginia and said that he was Eric Brown  
14 or Dwayne Pruitt, the defense could say hey, it wasn't  
15 Corey Bailey. It was some other person. That won't  
16 happen. We won't do that, and there's a good reason for  
17 it, and the reason for it is the second part, which is  
18 that law enforcement in each one of these instances was  
19 able to determine either at the time or shortly thereafter  
20 that the person was, in fact, Corey Bailey. No question  
21 about.

22 So when they either detained him or they arrested  
23 him, they would often take his photograph. They would  
24 take his fingerprints, and they knew who he was. So  
25 there's really no issue at all about whether or not there

1 was Corey Bailey. It's not a material issue.

2 So the government in response to the motion cited  
3 to the Weaver case, and the Weaver case is a Sixth Circuit  
4 unpublished opinion, and in the Weaver case they said that  
5 the use of an alias could be admitted because it was  
6 connected specifically to that case.

7 And what happened in Weaver is that Mr. Weaver was  
8 stopped by the police, and he gave what the police  
9 believed was a false name, and in response to that, they  
10 moved him from one place to another, to another residence  
11 so that they could determine who he was, and in the  
12 process of doing that, according to the police, Mr. Weaver  
13 took out a gun and dropped it.

14 So in the context of that case, they needed to  
15 show why it was that they were moving him from Point A to  
16 Point B and in relation to that he dropped the gun.

17 So that's the Weaver case, and that's so much  
18 different than what we're dealing with here, because the  
19 use of his aliases in all three instances are disconnected  
20 from anything that the police actually ended up doing. It  
21 doesn't matter. Had he said he was Mother Teresa or John  
22 F. Kennedy, everything that the police did for the most  
23 part afterwards ended up in with the same result.

24 So if we go first of all to the February 8, 2012  
25 incident, which Overt Act 66, if you recall when we had

1 the evidentiary hearing, that's when Detective Allen had  
2 information about some drug activity at an apartment.  
3 That apartment belonged to a person named Adam Halstead.  
4 And so they went and did what they call is a knock and  
5 talk because they were doing an investigation, and when  
6 they walked into the apartment, they saw Mr. Halstead,  
7 they saw a man identified as Mr. Powell, and they saw  
8 Corey Bailey. And they asked Mr. Bailey what is your  
9 name, and he said Eric Brown, but because of those  
10 officers who were there had been doing an ongoing  
11 investigation, one of them knew already that he was not  
12 telling the truth about who he was, but that didn't make  
13 any difference, because really what they were looking for  
14 were drugs in the apartment.

15 So they searched the apartment, and they find a  
16 single pill in the bathroom, and according to Detective  
17 Allen, he comes back and confronts Mr. Bailey and he says,  
18 do you mind if I pat you down, and Mr. Bailey allegedly  
19 says okay, and they pat him down, and they find some  
20 money, and they put it back in his pocket, and then they  
21 say, can we pat you down further, and in that pat down,  
22 according to Detective Allen, he feels a hard object in  
23 the cheeks of his buttocks, and they place him under  
24 arrest because he believes, based on his experience, that  
25 there are drugs, and they take him down to the precinct.

1 They don't have the drugs, and they get a search warrant.  
2 And in the search warrant, they don't refer to Eric Brown  
3 because they know who he is. The search warrant to do  
4 that intrusive search is for Mr. Bailey because they know  
5 who he is. And so eventually Mr. Bailey turn over the  
6 drugs, and that's essentially it.

7 It doesn't matter whether he said my name is Corey  
8 Bailey or Eric Brown. What happened happened, and they  
9 ended up with the drugs. So it isn't intricately  
10 intertwine into what happened in this case. It didn't  
11 matter one way or the other.

12 The same thing if we go to November 6, 2009, which  
13 is Overt Act 72. That's the case where the government  
14 claims that Mr. Bailey was walking in a parking lot. As  
15 he's walking in the parking lot, nearby are officers from  
16 the Charleston West, Virginia Police Department. They are  
17 in plain clothes, unmarked vehicle, and they claim that  
18 Mr. Bailey then drops some items. They don't know what it  
19 is. They go over and pick up the items, and those items  
20 include two small bags of marijuana, 53 pills of Xanax --  
21 not the drugs that normally were associated with the drug  
22 dealing of the Seven Mile Bloods -- and a small amount of  
23 cocaine.

24 So then they meet up with Mr. Bailey having seen  
25 him alleging throw down these drugs, and they ask him what

1 his name is. He says Dwayne Pruitt. It doesn't matter  
2 what he says. He could say whatever he wants. They are  
3 going to arrest him. They saw what he did, and so there  
4 is no connection really between what he is saying about  
5 who he is and police activity.

6 **THE COURT:** Wouldn't it intend to show  
7 consciousness of guilt?

8 **MR. DALY:** In what way? So if he says, I'm  
9 Judge Steeh, do you think they're going to do anything  
10 different? No. They are going to arrest you like they  
11 arrested Mr. Bailey. It doesn't really matter what he  
12 says. He can't conceal what he did based on who he is  
13 because they're operating not what he is saying about his  
14 identity, but what he did, right? So that's the  
15 disconnect.

16 So the government can say consciousness of guilt  
17 theoretically, and that has some traction to it, but it's  
18 only when you analyze the specific conduct of the parties  
19 and the place that you realize that theoretically it  
20 doesn't fit. That's why I'm going through all of the  
21 facts, because there's nothing that the police do that's  
22 different based on his fake name.

23 So the reason why I'm doing this is that 401, 403,  
24 401 is it relevant? Is it probative, and is it more  
25 prejudicial than probative? And so if Mr. Bailey got on



1 the witness stand and testified about these incidents,  
2 then they could introduce this for credibility. They  
3 could impeach him because he used a false name and he  
4 lied. So that's a different thing than the government in  
5 their case in chief using it as character evidence to  
6 impugn who he is. Those are accept two separate issues.

7 So I would say if we put him on the stand, the  
8 government is free to ask him about all his aliases, did  
9 he use them and why did he do it.

10 And the last incident is Overt Act 74 from  
11 October 27, 2009. That's a case where the police stopped  
12 a vehicle driven by a woman whose name I recall is  
13 Ms. Parker. I think you heard evidence of that at the  
14 evidentiary hearing. Mr. Bailey was a front passenger of  
15 the vehicle, and when they stopped the vehicle, because  
16 allegedly there was a brake light that was out, and they  
17 ordered everybody out. Mr. Bailey was the front  
18 passenger. They told him to get out. They searched him.  
19 They found no weapons, no guns, no money. Nothing.

20 So what is the consciousness of guilt related to  
21 that because they don't arrest him? He's got no drugs.  
22 He's not hiding anything in terms of the offense. What  
23 they found a bag -- a duffel bag in the trunk with a small  
24 amount of marijuana and some money that Mr. McClure said  
25 belonged to him, and Mr. McClure was arrested.

1           So what I'm trying to do, Judge, is give you the  
2           specifics of the case that put it in context because the  
3           government often says in their reply, you've got to put it  
4           in context.

5           So when we move from the theoretical of  
6           consciousness of guilt to the specifics, there's such a  
7           disconnect between the two, that it is our position that  
8           you should exclude that in the case in chief. You're  
9           frowning at me.

10           **THE COURT:** Yeah, I'm not sure I understand  
11           the theoretical reference. You got -- why would it be any  
12           different than fleeing the police? Obviously, defendants  
13           may flee for a number of innocent reasons --

14           **MR. DALY:** Yes.

15           **THE COURT:** -- but one potential inference on  
16           flight by a defendant is that he's fleeing because he  
17           knows that he's done something wrong, and he doesn't want  
18           to be caught.

19           **MR. DALY:** Yes.

20           **THE COURT:** Right?

21           **MR. DALY:** Right.

22           **THE COURT:** Why is this any different from  
23           that?

24           **MR. DALY:** Well, there's a difference between  
25           flight where we're trying to actively escape arrest or

1 detection, and what I said. So if the person, according  
2 to the police, committed the crime in their presence, it  
3 doesn't matter who they are. That's the disconnect. So  
4 it doesn't matter what he says about who he is. He's  
5 going to be arrested, right?

6 **THE COURT:** Well, depending on the discretion  
7 the officer employs. We have a number of incidents with  
8 these very defendants where they might -- you might have  
9 anticipated that they would be arrested, but the officer  
10 employed his discretion and decides that maybe somebody  
11 else is more culpable than this individual and lets them  
12 pass, and maybe that could very well be the result because  
13 in another context they don't know who they are dealing  
14 with.

15 **MR. DALY:** I think as a general concept, I  
16 would agree, but when you get down to the specifics of  
17 what was happening, I don't think that the officers would  
18 ever exercise their discretion not to arrest Mr. Bailey  
19 because he said he was somebody else given what they saw.  
20 If they see him drop the drugs, they are going to arrest  
21 him, right? They are not going to say, oh, you're Eric  
22 Brown. We'll let you go home. Oh, you're Dwayne Pruitt.  
23 We'll let you go home. You're not Corey Bailey. We'll  
24 let you go home. That's what I'm talking about.

25 The question of flight is separate from the use of

1 an alias to try to deceive the police in terms of what  
2 they are doing. That is at least how I see it in the  
3 context.

4 **THE COURT:** Okay. Thank you, Mr. Daly.

5 **MR. DALY:** Do you want me to go onto the next  
6 area, or do you want them to respond because we are going  
7 through a number of different areas?

8 **THE COURT:** Well, why don't I hear the  
9 response. I know part of the response is going to be it  
10 is premature, that I should be making these judgments as  
11 the evidence comes in, and if I end up agreeing with it,  
12 maybe that will relieve you of the need to go through all  
13 of the others.

14 **MR. DALY:** Okay. Thank you.

15 **MR. SLOAN:** Good morning, your Honor.  
16 William Sloan on behalf of the United States.

17 **THE COURT:** Welcome, Mr. Sloan.

18 **MR. SLOAN:** Thank you, your Honor.

19 Your Honor, as you just mentioned the first  
20 argument the government would make is that this is  
21 premature; that most of evidentiary arguments raised by  
22 the defendant, including this one, would be better  
23 resolved during trial in the proper factual context, but I  
24 would like to avoid -- excuse me -- address a couple of  
25 the issues raised by Mr. Daly.

1           Just starting with the framework, the cases here,  
2           I certainly agree with Mr. Daly on the cases he cited, and  
3           there's a Sixth Circuit case that says we disfavor the use  
4           of aliases in indictments or at trial. However, I think  
5           it is important to look at the context of those cases, and  
6           what the Court's concern is.

7           I think these are best interpreted as the Court  
8           just putting a thumb on the scale of 403, and cases that  
9           the defendant cites involves these facts.

10          Number one in Wilkerson, that involved the  
11         prosecutor inflaming the jury, as the court put it, by  
12         referring to the defendant using an alias and saying  
13         people with nothing to hide don't use aliases. That's not  
14         the case here. It's not what the government will use this  
15         evidence for. This evidence will come in simply as part  
16         of the narrative explanation of testifying regarding the  
17         police officers.

18          Number two --

19                 **THE COURT:** Wait. Wait. Wait. So we're  
20         discussing the probative value of this evidence, and  
21         you're argument is that it is just part of the narrative?

22                 **MR. SLOAN:** Well, your Honor, I'll turn to  
23         that in one second. I was just trying to set the  
24         framework. I think the Court's concern of these cases is  
25         sort of the inherently prejudicial nature of a potential

1       nickname, or if the government uses it in a certain way.  
2       Neither is the case here.

3               So the other example that I was going to make,  
4       your Honor, is in the Williams case. That defendant's  
5       nickname was Capone. Obviously, that has some inherent  
6       prejudicial value.

7               If this were a case hypothetically where the  
8       defendant's nickname was murder, quote-unquote, but it was  
9       a drug case, we could certainly understand why there might  
10      be an issue there. That is just not the factual  
11      circumstance we're dealing with here. These were anodyne  
12      fake names, just like Joe Smith, the defendant gave  
13      obviously to avoid getting caught.

14              There were three instances which Mr. Daly referred  
15      to, and as the government set forth in its brief, these  
16      uses of fake names are relevant for a couple of reasons.

17              Number one, I think it does help certain officers  
18      identify the defendant for a given action. It's part of  
19      the narrative explanation of how this encounter  
20      unfolded -- how they first encountered Mr. Bailey, and  
21      ultimately identified him by his true name. But as the  
22      Court referred to a minute ago, I think the really  
23      important point here is it is evidence of consciousness of  
24      guilt, not only of the pattern of drug dealing conduct in  
25      West Virginia, which is alleged as racketeering activity

1 in the indictment, but also the government would note of  
2 the October 21, 2009 murder of Ronald Calloway.

3 The first -- I think it is notable, your Honor,  
4 that the first time Mr. Bailey used the alias Dwayne  
5 Pruitt was October 27th, just six days after that  
6 homicide. So perhaps he left the Detroit area, was down  
7 in West Virginia, and when encountered by the police it  
8 doesn't matter whether or not they found anything on him  
9 or were going to arrest him. It's what was in Mr.  
10 Bailey's mind, which is, I want to avoid getting caught.  
11 He doesn't know what the police are going to do. The  
12 police might just run the name he gives, and not  
13 ultimately fingerprint him and take him back to the police  
14 station to confirm that identity.

15 So I think it is consciousness the guilt because  
16 Mr. Bailey just doesn't know what actions the police are  
17 going to take as the your Honor just pointed out.

18 Your Honor, I would also point out that he used  
19 that fake name twice in a row or about two weeks later,  
20 which again, is evidence of the pattern of his travel to  
21 West Virginia for drug activity, and using the same  
22 pattern of trying to avoid getting caught giving the same  
23 name to police.

24 Your Honor, for those reasons, the government  
25 would suggest, first of all, that it's premature to

1 exclude this categorically in advance of trial, but on the  
2 merits it is relevant to show consciousness of guilt on  
3 behalf of Mr. Bailey.

4 **THE COURT:** Okay. Thank you.

5 **MR. DALY:** So Judge, I'll just respond, and  
6 then I'll move on to the next argument.

7 As you heard in the evidentiary hearing, when  
8 Detective Allen and the other officer -- whose names  
9 escape me -- when they talk about these incidents when  
10 Mr. Bailey used an alias, they refeed to him as Bailey.  
11 They never referred to him as Brown or Pruitt, because  
12 they knew who he was. The only time the alias came up was  
13 when the government directly asked the question, did he  
14 use a different name. Other than that, they started from  
15 Point A to the end, always referred to him as Corey  
16 Bailey. So it's -- there's no confusion here among the  
17 police about who he was, and what they are going to say at  
18 trial.

19 So when talking about consciousness of guilt, it  
20 has to be consciousness of guilt of the crime charged is  
21 what the law says, and so the government says well, if  
22 it's not consciousness of guilt of the actual offense for  
23 which he was arrested, it has something to do with a  
24 homicide back in 2009, but what they didn't tell you is  
25 that the warrant for the homicide in 2009 wasn't signed by



1 the prosecutor until October 26th. So we're talking about  
2 him using an alias on October 27th in West Virginia, and  
3 the chances of him knowing that a warrant signed by the  
4 prosecutor had been put on the docket sheet, and not  
5 necessarily put in the lien machine the day before is  
6 almost zero. So to say that he was trying to avoid  
7 apprehension for the homicide does not fit either  
8 factually.

9 So that's what I would say in response to the  
10 government, and may I move to the next issue, Judge?

11 **THE COURT:** Yes.

12 **MR. DALY:** Thank you.

13 So this has to do with the conspiracy hearsay  
14 objections, and again, the government says that this is  
15 premature, and if you agree, I will sit down and not say  
16 another word. I will object during the trial, but my  
17 understanding is that when we filed this original motion  
18 to have you order the government to disclose to us at  
19 least 24 hours in advance what they intended to do, it was  
20 your intent to have these issues litigated not in front of  
21 jury, but before, and that's why I don't think it is  
22 premature because that's the same argument that they made  
23 as they just did.

24 They don't want you to rule on this, but they  
25 haven't said to you that these witnesses will say

1 something different than what they said in the first  
2 trial; in other words, they don't have, and they don't  
3 make an offer of proof that there's some additional reason  
4 why this evidence should be admissible. And so I say as a  
5 matter of expediency, you should decide this now unless  
6 the government has something else that they have not put  
7 in their brief that they want to bring to your attention.

8 And so what we are talking about are two witnesses  
9 that testified during the first trial, and the first  
10 witness is a person Derrick Kennedy.

11 So Derrick Kennedy testified that contrary to the  
12 government's brief where they said that he was an SMB  
13 member, he testified explicitly before you during his  
14 guilty plea he was not a member, which you considered  
15 previously in ruling on these issues was important.

16 So we have Derrick Kennedy saying he's not a SMB  
17 member, and we also have the fact that the other person  
18 who is involved in this conversation, allegedly Michael  
19 Rogers, was acquitted.

20 So does the acquittal mean that you're completely  
21 bound by that? No, because it is proof beyond a  
22 reasonable doubt, and now you're at a preponderance of the  
23 evidence. So those are two different standards, but to  
24 ignore that powerful evidence that he was acquitted, I  
25 think would be a mistake.

1           So the beginning of analysis is are these people  
2           who are SMB members or not, and that's the beginning of  
3           the conversation I think for you.

4           So according to Mr. Kennedy -- and this involves  
5           the shooting of Djuan Page in July of 2014, July 14th --  
6           this is what the conversation allegedly is about. After  
7           the July 14th shooting, 2014, near the Lawton parole  
8           address, according to Mr. Kennedy, he has a conversation  
9           with Arnold, and in that conversation with Arnold, Arnold  
10          says, I did the shooting. I did it alone. Nobody else  
11          was with me. I used my own gun, and it was a  
12          10-millimeter. That's what he tells Kennedy, and I  
13          believe -- although may be mistaken -- that ultimately the  
14          government retrieves a slug from one of twins Michael who  
15          was in the car too, and that slug is consistent with a .40  
16          caliber 10-millimeter weapon. So that's all Kennedy  
17          knows. And Derrick Kennedy and Arnold are like this.  
18          They are very close. Derrick Kennedy talked about being  
19          at the mall, the confrontation with the twins and the  
20          Hustle Boys, how he stuck with him. They are really  
21          tight.

22          Now we go all the way to December, five or six  
23          months later, and Derrick Kennedy claims that he has a  
24          conversation with Michael Rogers. So that's why I brought  
25          up Michael Rogers who was acquitted, and he claims that in

1 this later conversation with Michael Rogers, the subject  
2 of why the police and the FBI were looking at Corey Bailey  
3 about the July shooting, and Kennedy says, I don't  
4 understand it. Arnold told me he was the only one  
5 involved. Why were they looking at Sonny, and allegedly  
6 Michael Rogers says something to the effect, the dumb ass  
7 was leaning out the window and waving a flag, and that's  
8 what we're trying to keep out because it is not a  
9 statement in furtherance of the conspiracy.

10 And the two cases, one of which you often refer to  
11 in the prior trial, Worman, and the other case Mitchell,  
12 is what Michael Rogers is doing, assuming that it's true  
13 for the purposes of this argument, he is merely informing  
14 Mr. Kennedy about a past event. He's not furthering the  
15 conspiracy in any way, shape or form. This is a  
16 conversation just between two people who I say are not  
17 members of the Seven Mile Bloods, and they are trying to  
18 clarify what had happened, and there's really nothing in  
19 that conversation that could promote the objectives of the  
20 conspiracy.

21 So the government faced with that, again theorizes  
22 that the importance of that conversation was that  
23 Mr. Kennedy was now on notice that the people involved in  
24 the shooting was not just Mr. Arnold, but Mr. Bailey, and  
25 they theorize that the significance of this in terms of

1 the objective of the conspiracy was that Mr. Kennedy was  
2 now on notice that Mr. Bailey was also involved, and  
3 therefore, Kennedy needs to stay away from Bailey because  
4 of the retaliation and the conflict between the two  
5 parties that he could be the subject of a shooting.  
6 That's their theory about how it further the conspiracy.

7 But the problem with that is that it is not case  
8 specific. Why? Because Kennedy was already on the hit  
9 list for the Hustle Boys. He was already a target. It  
10 didn't matter who he associated with, whether it was  
11 Arnold, Bailey or Scooby-Doo. It doesn't matter. He's  
12 already on the hit list, number one.

13 Number two, because of his close relationship with  
14 Bailey, and the Hustle Boys knew that because they  
15 confronted Arnold and Kennedy together on multiple  
16 occasions, he was already a target by his relationship  
17 with Bailey, and because the brothers, the twins, had  
18 allegedly said that Arnold was involved in the shooting.

19 So this whole theory about, oh my God. Now he's  
20 going to be a victim of a shooting in retaliation, is not  
21 an accurate representation of the specific facts. So it  
22 is a fishing theory unsupported by the evidence, Judge,  
23 and we would ask that you exclude that.

24 I don't think there's anything else that Mr.  
25 Kennedy has ever said in a proffer or trial other than

1        what I said, the government knows about it. Let them say  
2        it, but I haven't seen it. So we're trying to keep that  
3        out.

4                The other thing has to do with Ms. Scott, and as  
5        you recall, Ms. Scott testified about an incident sometime  
6        in July of 2014. Again, this is according to government's  
7        theory somewhat related to shooting on the 14th.

8                According to Ms. Scott, she was in a vehicle  
9        with Mr. McClure, and they are driving over to the Erotic  
10       City, a bar, and at this bar allegedly our Hustle Boys,  
11       including the twins, and on the way over, according to Ms.  
12       Scott, Mr. McClure, who is dead, says we are going to  
13       start something. A rather vague statement. There's no  
14       weapons in the car. It's not clear from her testimony  
15       that, in fact, Mr. Bailey is present in the car. They  
16       pick him up.

17               So what we have is, we have Ms. Scott in her  
18       first debriefing on September 20, 2016, never mentioning  
19       this, I'm going to start something. That's the first  
20       debriefing.

21               The second debriefing is December 9, 2016.  
22       Again, she says nothing about McClure saying something is  
23       going to get started, and then there's her trial testimony  
24       from the last trial which she makes this statement.

25               So in response to trying to keep this out

1 because it's not in furtherance of the conspiracy, the  
2 government's response is that it's a verbal act, and it's  
3 not offered for the truth, which is, again, has some sex  
4 appeal to it, but the problem is if you admit it for that  
5 reason, we're going ask that you turn and tell the jury  
6 with an instruction that that statement is not being offer  
7 for the truth, right? Tell them right now that the  
8 government is saying something, but they're not claiming  
9 it's true. It's just going to show what was said, and let  
10 the jury try to figure that out and understand it.

11 So when they start by saying that it's not being  
12 offered for the truth, then they switch gears later on and  
13 they say look what happened. He said something was going  
14 to happen and something did happen. So in essence, they  
15 really want the jury to accept it for the truth of the  
16 matter asserted, that is, that something was going to  
17 start.

18 So then according to Ms. Scott, the two  
19 individuals, meaning Mr. Bailey and Mr. McClure, they go  
20 into the Erotic Club. They are gone for 10 minutes. Come  
21 back. Mr. McClure is bleeding from the head, pounds on  
22 the window, and allegedly says Neff hit me with a bottle,  
23 and we're seeking to exclude that too. The government  
24 says it's an excited utterance. It isn't at this point.  
25 They may be able to, they may not be able to lay a

1 foundation, but at this point the record doesn't support  
2 that.

3 But really in the end, there are some other  
4 things that you need to consider in context of this motion  
5 about what was happening at the time, and whether or not  
6 they were going to go there to start something. She  
7 testified there was a flier about this party, and the  
8 people that were invited were Mr. McClure and Mr. Bailey.

9 So in the context of this information that the  
10 government wants to seek in introduce in their case in  
11 chief, Judge, we would say they don't have the proper  
12 foundation. It's not in furtherance of the conspiracy,  
13 and we would ask that you exclude it. Thank you.

14 **THE COURT:** All right. Thank you.

15 Mr. Sloan?

16 **MR. SLOAN:** Thank you, your Honor.

17 Your Honor, picking up on Mr. Daly's last point, I  
18 think it's a perfect example of why ruling now pretrial is  
19 simply not possible. What the defense does in their  
20 motion is assume that the trial transcript from a previous  
21 trial with different defendants is somehow set in stone,  
22 and the witnesses are going to say the exact same thing  
23 and create the exact same foundation.

24 As your Honor knows, that's just not the case.  
25 What matters is the evidence will come in fresh in a new



1 trial with these defendants, and the witnesses will  
2 testify to what they will testify to. They may testify in  
3 a slightly different way, or articulate different details,  
4 and that's for obvious reasons.

5 Number one, there are different defendants on  
6 trial. So they may be asked different questions more key  
7 to those defendants. That may produce different  
8 information. Different attorneys will ask the questions  
9 in a different way, and witnesses, you know, may say  
10 things a little bit differently if asked a question  
11 differently or they remember it better this time.

12 So I think as a starting point we can't just  
13 assume this prior trial transcript, which defense counsel  
14 has used to make the factual basis for his motion, is  
15 controlling, and that's why the government starts with the  
16 initial point, which is that essentially the Court has  
17 already ruled how it wants to handle proffers about out of  
18 court statements, and that was Court's order, docket entry  
19 828, which is a day prior notice by the government of  
20 anticipated out of court statements, and then the Court  
21 will conditionally admit those subject to the government  
22 proving the three elements required for a co-conspirator's  
23 statement in furtherance by a preponderance of evidence.

24 So just as a starting matter, the government  
25 recommends that the Court stick to that plan precisely

1 because the evidence will be coming in in a new way.

2 Just as one example of that, your Honor, it's hard  
3 to make these determinations whether it's 801(d)(2)(E) or  
4 some other hearsay exception or exclusion in advance of  
5 trial, because the evidence might be developed slightly  
6 differently.

7 For example, Mr. McClure statements to Ms. Scott  
8 and or Mr. Bailey regarding the July 2014 trip to a rival  
9 Hustle Boy gang party where Mr. McClure said he was going  
10 to start something, comes back to the car a few minutes  
11 later bleeding with Mr. Bailey, and says Neff hit him in  
12 the head with a liquor bottle.

13 Now one of the -- that statement that Neff hit him  
14 in the head with a liquor bottle was repeated several  
15 times by Mr. McClure as Ms. Scott testified to her when he  
16 and Bailey came back from the club initially, again to  
17 Billy Arnold sometime shortly thereafter, and then later  
18 to other SMB members, Jig and Nice, at a house, and one  
19 thing that was not developed in Ms. Scott's testimony was  
20 what, if any, initial reaction did Billy Arnold have when  
21 Mr. McClure said that rival gang member just hit me in the  
22 head with a liquor bottle. We just don't know the answer  
23 to that question.

24 So to categorically exclude something before trial  
25 makes no sense in the circumstances because we don't know

1        what the exact foundation will be.

2                Now turning to 801(d)(2)(E) specifically your  
3        Honor, which is really the heart of the defendant's motion  
4        here, and I would say as a side, your Honor, I apologize  
5        for the lengthy brief, but the government did that just as  
6        a preview of ways that this could come in, and the reason  
7        the government set out alternative explanations is for the  
8        reason that I just articulated. We just don't know what  
9        the witness might say at the time, but I will say to the  
10       Court that most, if not all of these, the government  
11       believes will be admissible for their truth under  
12       801(d)(2)(E).

13               And before I turn to the specific statements in a  
14       little more detail, I just want to point out some  
15       parameters of the law that I think were a little bit  
16       muddled in Mr. Daly's motion. The three elements that the  
17       government has to show by a preponderance and the finding  
18       that the Court has to make is number one, a conspiracy  
19       existed, number two, that the defendant against the  
20       statement was offered, in this case Mr. Bailey, was a  
21       member of that conspiracy, and number three, that the  
22       co-conspirator declarant made the statement during and in  
23       furtherance of the conspiracy.

24               I think the motion really focuses on prong three,  
25       but I just want to clarify number one, as to the speaker

1 or declarant, just to reiterate, Mr. Daly conceded I  
2 think. The fact that Michael Rogers was acquitted does  
3 not bar him from being a co-conspirator for purposes of  
4 801(d)(2)(E) analysis. The jury acquittal simply means  
5 the jury didn't find that he was guilty of RICO conspiracy  
6 beyond a reasonable doubt, which, of course, is a higher  
7 standard than mere preponderance. And we would point to a  
8 Sixth Circuit case that specifically states this, and  
9 that's United States versus Todd, T-o-d-d, 920 F.2d 399.

10 And then point number two, the listener need not  
11 be a co-conspirator. The language that Mr. Daly used in  
12 his brief was these statements should not come in because  
13 they are not, quote-unquote, among co-conspirators, but  
14 that's not what the rule requires. The rule requires that  
15 the defendant against whom it's offer be a co-conspirator  
16 and the declarant be a co-conspirator, and we have that  
17 here. Mr. Bailey -- the government anticipates the trial  
18 evidence will show that Mr. Bailey, Mr. McClure and Mr.  
19 Rogers were all part of a racketeering conspiracy.

20 Mr. Daly claimed that Mr. Kennedy testified that  
21 he was not SMB. Your Honor, I beg to differ with that  
22 characterization. In fact, in the first trial he  
23 testified he that he was 5-5, which is in some sense  
24 synonymous with or a certain subgroup of SMB. He even  
25 testified that he had a 5-5 tattoo on his body, as does

1 Mr. Rogers. So the government anticipates that trial  
2 evidence will show that Mr. Kennedy was, in fact, a  
3 co-conspirator and Mr. Rogers was a co-conspirator.

4 Now turning to first set of statements by Michael  
5 Rogers to Derrick Kennedy regarding the July 14th shooting  
6 of Djuan Page, Neff, and the substance of that statement  
7 as Mr. Daly stated was that Mr. Kennedy didn't know until  
8 Mr. Rogers told him that Mr. Bailey was in the car with  
9 Billy Arnold during the shooting. And the defense  
10 argument essentially is that this couldn't be in  
11 furtherance because it is months --

12 **THE COURT:** After the fact.

13 **MR. SLOAN:** -- after the fact --

14 **THE COURT:** Right.

15 **MR. SLOAN:** -- and therefore, how could this  
16 possibly further a conspiracy, and the government's  
17 response, your Honor, is that the case law I think --  
18 well, start with the case law.

19 Statements that serve to identify co-conspirators  
20 and their roles in the conspiracy are in furtherance, as  
21 well as statements that update or apprise a co-conspirator  
22 of the status of the conspiracy, and in this case the  
23 conspiracy, part of what's alleged, is of this  
24 racketeering enterprise. This gang was an ongoing gang  
25 war with rivals, and part of the pattern of their

1 racketeering activity was to protect their image and  
2 reputation through violence and force through controlling  
3 territory in the Red Zone.

4 And so in the midst of an ongoing shooting gang  
5 war, the government submits that being informed one of  
6 your co-conspirators was involved in a particular shooting  
7 is precisely an update on the status of the conspiracy.

8 The second point, your Honor, is, you know, I  
9 think context matters here. It's true the statement was  
10 made a few months after the shooting, but as the  
11 government pointed out in its brief, in the intervening  
12 time -- and in fact right before the statement was made  
13 around Christmas time of 2014 -- two other SMB members had  
14 recently been shot.

15 So it just goes to show that this was an ongoing  
16 shooting war, and in fact, the government would submit  
17 that the July shooting of Neff kicked off the shooting  
18 war. And so to be informed of an update of the conspiracy  
19 in December was just as relevant then as it would be in  
20 July of 2014.

21 Why? So that a co-conspirator would take actions  
22 to go stay alive and or take vengeance on rival gang  
23 members. It's certainly relevant to know that one of your  
24 fellow gang members did something you thought other one  
25 did, so that if you're walking down the street with

1 Mr. Bailey, you might be more likely to be shot than with  
2 another member.

3 And your Honor, I think what's lost in Mr. Daly's  
4 motion is the three elements of 801(d)(2)(E) are by  
5 preponderance. That's more likely than not. The  
6 government does not have to prove 100 percent or beyond a  
7 reasonable doubt that the statement did further, or it was  
8 only intended to communicate this to this co-conspirator.  
9 In fact, the case law is pretty clear that statements that  
10 can be interpreted with different meanings or that were  
11 made not even primarily to further the conspiracy can be  
12 in furtherance. The preponderance standard is not an  
13 incredibly a high bar for this third prong.

14 And the last point on the Michael Rogers  
15 statements, your Honor, in terms of timing it, I think a  
16 good case in point factually would be the Odum case,  
17 O-d-u-m, 878 F.3d 508, which we did cite in our brief,  
18 and, you know, admittedly, the time span is a bit short in  
19 this case. The statements were made shortly after the  
20 shooting, but I think the purpose comes across here.

21 In that case this was a motorcycle gang vicar  
22 trial I believe before Judge Borman initially, and on  
23 appeal the defendants contested admission of certain  
24 statements that the shooters came back to the motorcycle  
25 clubhouse shortly after the shooting, and updated the club

1 leadership on the shooting they just done. And what the  
2 Sixth Circuit said was, you know, even though it happened  
3 after the fact, it's a statement of a past event, this was  
4 in furtherance because the statements were updating the  
5 leadership to that they could take steps to avert  
6 retaliation from the rival gang who was a victim of the  
7 shooting.

8 It's a very similar purpose here. Mr. Rogers is  
9 updating Mr. Kennedy on what a co-conspirator has done so  
10 he can take steps to anticipate a response from the rival  
11 gang.

12 And turning briefly to the next set of statements  
13 which were made by Mr. McClure to -- some combination of  
14 Ms. Scott and Mr. Bailey and then Mr. Arnold, Jig and Nice  
15 subsequently. As the government laid we think those are  
16 admissible for a number of reasons, but to include  
17 801(d)(2)(E).

18 And as to Ms. Scott, I would like to emphasize  
19 something that we didn't necessarily emphasize in the  
20 brief, which is, that we think these are 801(d)(2)(E) as  
21 to her as well, both the statement that Mr. McClure is  
22 going to start something in the club, as well as the  
23 subsequent statement that Neff hit him in the head with  
24 the bottle, and the reason is this, your Honor, the law  
25 does not require that the -- number one, that the



1 listener, Ms. Scott, be a co-conspirator at all. It only  
2 requires that the listener be prompted to take some action  
3 to facilitate the conspiracy, and that's exactly what  
4 happened here.

5 Ms. Scott drives -- her boyfriend Mr. McClure  
6 tells Ms. Scott, I'm going to start something at a rival  
7 gang party. What is her response? She drives him and  
8 Mr. Bailey to that party, waits for him. When he comes  
9 back, Mr. McClure informs her that he was hit in the head  
10 by a rival gang member. What does she do? She drives Mr.  
11 McClure, Mr. Bailey to talk to Billy Arnold, and then  
12 drives Mr. McClure to talk to Jig and Nice so they can  
13 communicate what this rival gang did to disrespect and  
14 assault Mr. McClure.

15 So in that sense, Ms. Scott is acting upon  
16 statements by Mr. McClure to take actions to facilitate  
17 further action by the gang. So we submit that Ms. Scott,  
18 the statements to her, also fall within the co-conspirator  
19 exception here.

20 And your Honor, I don't want to belabor the other  
21 arguments that we made in the notice brief unless the  
22 Court has any question.

23 **THE COURT:** I'm good. Thanks.

24 So the -- with respect to the evidence that has  
25 just been reviewed, I have not really heard anything that

1 would lead the Court to conclude that the protocol we  
2 employed during the first trial is not appropriate, and  
3 that the evidence should be excluded without considering  
4 the state of the evidence to the date of the statement in  
5 dispute as a co-conspirator statement pursuant to 801  
6 (d)(2)(E), and the analysis that is dictated.

7 I think the parties agree on the analysis that  
8 needs to be employed. The process of notifying opposing  
9 counsel of their intention to introduce evidence pursuant  
10 to 801(d)(2)(E) by the day before the continuation of  
11 trial I think is appropriate as the protocol was  
12 established originally, and it worked well. It think it  
13 gave the both sides the opportunity to consider whether  
14 the statement is idle chitchat about past events, or an  
15 update on the status of the ongoing conflict between rival  
16 gangs and the risks that individual defendants are members  
17 or participants in an enterprise committed.

18 So the Court is going to I think refrain from  
19 making a declaration at this juncture with respect to the  
20 admissibility of the evidence because it can, indeed, be  
21 affected by the other evidence in the case up to the time  
22 of the claims statement.

23 So the Court will deny the motion in limine, so  
24 that the analysis can be undertaken, if there is a  
25 conflict between the parties with respect to admissibility

1 of the same evidence at the time it's intended to be  
2 introduced by the government.

3 It also pairs up with Rule of Evidence 104(b),  
4 which permits the Court to proceed to make conditional  
5 admissions based on what request other evidence is  
6 anticipated, and I think there was a fair amount of  
7 testimony at the first trial that was introduced and was  
8 conditionally admitted, and I think by the end of the  
9 evidence phase there were no conflicts over the  
10 admissibility of those statements that were conditionally  
11 admitted under 104(b).

12 So I think the process worked successfully and  
13 efficiently in the first trial, and should again in this  
14 trial.

15 Why don't we take a five minute break.

16  
17 (Recess taken.)

18  
19 (Proceedings resumed.)

20  
21 **THE COURT:** All right. So again, we're going  
22 to employ the protocol that was employed in the first  
23 trial.

24 And next on my list is just a scheduling question.  
25 One, we're going to begin with the preliminary

1 instructions from the Court which will be relatively brief  
2 except for a summary of the elements of the various claims  
3 that are agreed upon here. They have a proposal that was  
4 I think generated initially by the government, and then  
5 tweaked by the defense. So is there any remaining  
6 conflicts to be resolved as it relates to the elements of  
7 the charges?

8 **MR. WECHSLER:** Justin Wechsler for the  
9 government.

10 The only issue we had after Mr. Spielfogel sent it  
11 to the government was -- I apologize. I don't have it in  
12 front of me -- the line about it's not illegal to be a  
13 member of the Seven Mile Bloods, or it's not a crime to be  
14 a member of the Seven Mile Bloods. We're okay with that  
15 statement generally, but we prefer say it's not illegal to  
16 be a member of an enterprise, because those definitions  
17 that appear right before that talk about what an  
18 enterprise is over and over again, and all of a sudden  
19 we're saying the proposal it's not illegal to be a member  
20 of the Seven Mile Bloods. As long as we make it it's not  
21 illegal to be a member of an enterprise, we're okay with  
22 the suggestions that Mr. Spielfogel put forward.

23 **THE COURT:** Okay. That was put forward by  
24 Mr. Spielfogel and who?

25 **MR. WECHSLER:** I believe it came from Mr.

1 Spielfogel.

2 **MR. MAGIDSON:** I also supplemented something.

3 **THE COURT:** Okay. What was your supplement?

4 I know I just entertained a request --

5 **THE CLERK:** I have it.

6 **MR. MAGIDSON:** I'm glad somebody has it.

7 **THE COURT:** As proposed by the defense, as it  
8 relates to what Mr. Wechsler just addressed, the proposed  
9 language is it is not illegal in and of itself to be a  
10 member or associate of the Seven Mile Bloods, and that was  
11 proffered by who, defendants collectively?

12 **MR. DALY:** I think by Mr. Spielfogel. There  
13 was no objection from the other lawyers. So I would say  
14 by silence, that they agree.

15 **MR. MAGIDSON:** If I may, I was just handed by  
16 one of my colleagues here something that I did tender. I  
17 thought I was tendering it to the Court, but apparently it  
18 never made it.

19 **THE COURT:** Okay.

20 **MR. MAGIDSON:** When I do things on my own,  
21 that's what happens. I cited a case, United States versus  
22 Turkette, a Supreme Court case, 452 U.S. 576. In there  
23 they had language as follows: While the proof used to  
24 establish the separate elements may in a particular case  
25 coalesce, proof of one does not necessarily establish the

1 other. The, quote, enterprise, end of the quote, is not  
2 the pattern of racketeering activity. It is an entity  
3 separate and apart from the pattern of activity in which  
4 it engages. The existence of an enterprise is a separate  
5 element which must be proved by the government.

6 That was part -- because the government had  
7 included in addition to the actual elements, there's some  
8 commentary that was included, and I thought as long as  
9 we're going to be doing that, then we should balance this  
10 as well. And so I thought this would be important just to  
11 tell the jury that there's different -- that there's a  
12 distinction that has to be made all times, and that an  
13 enterprise is not to same as a pattern of racketeering  
14 activity, and that it has to be proven separately. This  
15 is an general instruction.

16 **THE COURT:** So following the five elements of  
17 the RICO conspiracy charge in Count 1, we have a  
18 paragraph, and the paragraph describes what an enterprise  
19 is.

20 **MR. MAGIDSON:** Right. If I may, Judge, I can  
21 tender this to the Court for your edification.

22 **MR. WECHSLER:** Can we see a copy? This is  
23 first chance that we heard about this.

24 I think when the Court lays out the five elements,  
25 you know, first this, second this, it's going to be clear

1 to them, the jurors, that there are five distinct  
2 elements, and I don't necessarily have a huge problem with  
3 the Court saying these are distinct, and each have to be  
4 proved, but it seems that this statement that Mr. Magidson  
5 just gave to us, it's going too far into almost a final  
6 jury instruction, and in some ways an argument from the  
7 defense attorneys of what does and does not need to be  
8 proven. I just think the jurors, this early on, will  
9 benefit from more of a succinct instruction than --

10 **THE COURT:** That ship has sailed I think.

11 **MR. WECHSLER:** Well, in fairness yes, you  
12 know, one of the alternatives would just be the elements  
13 solely. We tried to limit the definitions we wanted to  
14 use because we think that everyone on that panel for both  
15 the prosecution and the defense will wonder what an  
16 enterprise is, and I think it's enough to say it's not  
17 illegal in and of itself to be a member of an enterprise.  
18 I think with those five elements, the jury will be able to  
19 put together what it is they need to be thinking about as  
20 the trial progresses. It think this in some way has  
21 become almost too legalistic.

22 **THE COURT:** Yeah, I was not processing it  
23 very well during --

24 **MR. WECHSLER:** I'll hand it to the Court.

25 **THE COURT:** All right. I'll consider the

1 addition sought here and incorporate it if I feel  
2 incorporating any of it in the proposed discussion of the  
3 elements is called for.

4 So at the last trial we didn't have any time  
5 limits, and I think that defense counsel must have had --  
6 must have conferred to parse out the discussion from  
7 defense counsel to defense counsel, so that we had the  
8 government consuming 40 minutes, we had Mr. Rataj  
9 consuming 20, Mr. Mullkoff consuming 25, Mr. Arnone 10 and  
10 Mr. Machasic five, and so it was quite manageable. I  
11 don't know if you have an idea of how long your opening  
12 statements are likely to require. The government first,  
13 Mr. Wechsler?

14 **MR. WECHSLER:** I will be doing the opening.  
15 Sometimes I speak fast. Sometimes I speak slowly, as I'm  
16 sure you're aware. I think realistically 45 minutes will  
17 be the max. It may go a little over that. I haven't  
18 timed myself, but I don't foresee myself going much longer  
19 than that at all.

20 **THE COURT:** Okay. Among defense counsel, Mr.  
21 Magidson?

22 **MR. MAGIDSON:** John Theis will be doing the  
23 opening. I've talked with him. He's not long winded. He  
24 will be talking about the salient points, and I would be  
25 surprised if he goes over 20 minutes.



1                   **THE COURT:**   Okay.

2                   **MR. DALY:**   Judge, on behalf of Mr. Bailey,  
3                   Mr. Spielfogel will be making the opening statement. I  
4                   have not talked to him about his specific time frame. He  
5                   has not indicated what that might be. I guess that's as  
6                   much information as I can give you at this point.

7                   **THE COURT:**   All right. Yes, Mr. Feinberg?

8                   **MR. FEINBERG:**   I suspect no more than 30  
9                   minutes, but I have a problem that I would like to address  
10                  the Court as to my giving an opening statement as it  
11                  relates to information that I was given late yesterday by  
12                  Eric Straus that may cause a problem with my proceeding  
13                  Monday with opening statement.

14                  **THE COURT:**   I see. Of course you can always  
15                  reserve.

16                  **MR. FEINBERG:**   Well, I don't want to do that.  
17                  Do you want me to present to the Court the issue that I'm  
18                  now confronted with?

19                  **THE COURT:**   Well, yes and no. Let me hear  
20                  from Mr. Scharg and Mr. Scharg.

21                  **MR. S. SCHARG:**   Good morning, your Honor.  
22                  Steven Scharg on behalf of Mr. Porter.

23                  Your Honor, I think we will be no longer than 20  
24                  minutes.

25                  **THE COURT:**   All right.

1                   **MR. H. SCHARG:** In Wayne County Circuit  
2 Court, they refer to us as the evil Scharg and good  
3 Scharg, and I'm embarrassed to tell you which one I am.

4                   In regards to the opening statement, for the first  
5 time 40 years, I intend to reserve.

6                   **THE COURT:** I see. Okay. All right.

7                   **MR. H. SCHARG:** We don't have -- Mr. Johnson  
8 is not here. So --

9                   **THE COURT:** Right. I just want to make sure  
10 it was likely that we will finish openings on the first  
11 day of trial, and it certainly appears likely that we  
12 will. I'm not imposing time limits.

13                   **MR. WECHSLER:** With that said, your Honor, is  
14 it fair to say the government should be ready to bring  
15 witnesses in for Tuesday morning, and use the first day  
16 more for whatever business the Court has with the jurors  
17 as well as openings?

18                   **THE COURT:** Well, I think we found that if  
19 you have one or two witnesses standing by, if concludes --  
20 if the opening statements conclude by noon, I would hate  
21 to lose that last hour.

22                   **MR. WECHSLER:** Fair enough.

23                   **MR. H. SCHARG:** I can give an opening  
24 statement if you want me to fill the time up.

25                   **THE COURT:** No, no. Definitely not. Okay.

1 I'll come back to Mr. Feinberg in just a moment.

2 The Court would like to encourage counsel to  
3 consider stipulations with respect to much of the medical  
4 evidence that we spent a lot of time admitting through,  
5 you know, the doctors who were in the ER, and really  
6 contributing nothing more than the notes that were  
7 introduced as records of treatment, and really I thought  
8 that it would be much more efficient to seek to stipulate  
9 at least to the introduction of the medical records, and  
10 forego the testimony of the treaters, but --

11 **MR. WECHSLER:** The government will speak with  
12 defense attorneys. We're prepare to stipulate to the  
13 doctors that come in for some of the nonfatal shootings,  
14 but for the medical examiners, we would like bring in  
15 those witnesses.

16 **THE COURT:** Okay. That makes sense.

17 **MR. WECHSLER:** Obviously, we will have a  
18 conversation with defense attorneys about this as well.

19 **THE COURT:** Right. Right. And so we've got  
20 conference rooms that are going to be down on the first  
21 floor that are going to be reserved. One will be reserved  
22 for defense counsel, which is near Judge Berg's chambers,  
23 and then the government witnesses will be, as they report,  
24 directed to a room that is next to Judge Tarnow's chambers  
25 so you can keep track of them and will be immediately

1 available.

2 So that's all I have on my list.

3 Mr. Feinberg, you wanted to address that issue?

4 **MR. FEINBERG:** Yes, your Honor. Late  
5 yesterday, early evening, I got a phone call from AUSA  
6 Eric Straus telling me that there is new witness that they  
7 have just found that is allegedly going to testify that  
8 Mr. Brown committed the murder. I have no report. I have  
9 no -- I believe that there was a photo display. I mean,  
10 this is 12 years ago that the murder took place. I  
11 suspect that I'm going to need to file a motion to have a  
12 evidentiary hearing as to the photo spread, how it was  
13 conducted.

14 Again, I don't have any of the information. Even  
15 if I got it today, I doubt whether or not I would be able  
16 to follow it before tomorrow or Monday. I can't give an  
17 opening statement if I don't know what the evidence is  
18 going to be involving the shooting. I know what is --  
19 what I have, but this is brand new.

20 So I'm letting the Court know that there's a  
21 possibility that I will not be prepared to even give an  
22 opening statement or proceed Monday morning without being  
23 able to get the information and file whatever motions are  
24 necessary, and the Court conduct an evidentiary hearing.

25 **THE COURT:** All right. Mr. Wechsler?

1                   **MR. WECHSLER:** Your Honor, yesterday agents  
2 did speak with a witness who -- well, he's listed in the  
3 police report from the 2006 homicide, but did not give a  
4 very detailed statement to the police at that time. The  
5 agents went back and talked to him yesterday, which Mr.  
6 Feinberg is correct. He picked out Mr. Brown in a photo  
7 array.

8                   We informed the agents that they needed to have  
9 the report done as soon as possible to get it to Mr.  
10 Feinberg. As he's indicated, Mr. Straus from our office  
11 give him this information yesterday. We are planning to  
12 have the 302 done today. We will reiterate to the agents  
13 again that they need to get it done as soon as possible  
14 for Mr. Feinberg to review.

15                  Additionally, we don't plan on presenting evidence  
16 of this homicide until I believe at least week two, which  
17 gives him an extra week to file any motions that he would  
18 like, and any litigation that needs to take place can  
19 happen after the 1:00 break.

20                  **THE COURT:** Would your opening statement be  
21 addressing any of this?

22                  **MR. WECHSLER:** The only thing that I plan to  
23 say is that we have witnesses who will testify about that  
24 homicide. I don't plan on saying anything about this  
25 particular witness. I'll leave it very vague. We do have

1 another witness in which he was -- Mr. Feinberg was given  
2 notice awhile ago that he would testify about this, and so  
3 I believe when I say that we have witnesses that will  
4 testify about this, that will cover that witness. I don't  
5 need to specifically say that we have John Smith who said  
6 that he saw Mr. Brown on the day in question. I don't  
7 need to list those individuals which would give Mr.  
8 Feinberg a chance to rebut that in his motions.

9 **THE COURT:** Right. All right.

10 **MR. FEINBERG:** May I respond?

11 **THE COURT:** Sure.

12 **MR. FEINBERG:** The 302 is not sufficient for  
13 me to know what is -- what I need to do. I need to get  
14 all of the information that led up to the 302 that was, I  
15 guess, prepared yesterday.

16 In addition, if there was any -- if there was a  
17 photo lineup, I need to get that, who conducted it, how it  
18 was done, whether or not there was a defense attorney  
19 present during the photo lineup, how it was done, whether  
20 or not it was just a regular photo array or whether or not  
21 it was a blind photo array.

22 **THE COURT:** Right.

23 **MR. FEINBERG:** I cannot be prepared for the  
24 trial unless I know that, and just to get a statement is  
25 insufficient because I know that I'll have to file a

1 motion that will --

2 **THE COURT:** We can conduct the hearing on a  
3 motion easily in the afternoon. So I mean, I think the  
4 only question is in what manner would your opportunity to  
5 make an opening statement, which is just -- we know from  
6 the government's side they are not going to make any  
7 specific references to the evidence that it is going to be  
8 introduced relative to this 2006 killing.

9 **MR. FEINBERG:** I understand. If they're  
10 going to indicate witnesses, plural, I need to know in my  
11 opening statement what we intend to show as it relates to  
12 the homicide, the witnesses, specific witnesses. If I  
13 don't have that information, I don't know whether or not  
14 this Court is going to allow that witness to testify. I  
15 don't know whether or not it's going to exclude them from  
16 presenting it. If they allow it -- if there's going to be  
17 a cautionary instruction as a result of it, I don't know,  
18 but I can tell you right now that I'm not prepared Monday  
19 to proceed without knowing evidence that is very, very  
20 crucial to the most serious of all counts that Mr. Brown  
21 is being charged with.

22 **THE COURT:** All right. Well, I'll certainly  
23 be in a position to consider it when you file your motion  
24 after you had an opportunity to review the papers that  
25 apparently are in preparation.

1                   **MR. FEINBERG:** But again, it's more than just  
2 a 302. That maybe what the government thinks all is  
3 necessary, but it's certainly not what I think is  
4 necessary to file the motion, and if I don't get  
5 everything, then there will be a motion to compel, which  
6 will prolong the necessity of me filing the motion  
7 relating to how it was conducted.

8                   I'm putting the Court on notice that I may come in  
9 on Monday and indicate to the Court that I'm not ready to  
10 proceed.

11                   **THE COURT:** Well, okay. I think you should  
12 be prepared for the possibility that the Court will agree  
13 there are other cures, and will call on you to make  
14 decision as to whether --

15                   **MR. FEINBERG:** I understand, but I do have a  
16 client that I'm representing to a certain extent takes  
17 precedence over whether or not the Court tells me that I  
18 have to proceed.

19                   **THE COURT:** Okay.

20                   **MR. FEINBERG:** I think Mr. Brown wants to  
21 raise his hand.

22                   **THE COURT:** Mr. Feinberg can talk to you for  
23 a moment.

24                   **DEFENDANT BROWN:** I want to speak to you.

25                   **THE COURT:** Well --



1                   **MR. FEINBERG:** That's what he wants to do,  
2 your Honor.

3                   **DEFENDANT BROWN:** I want to go on with the  
4 trial. I'm ready Monday.

5                   **THE COURT:** I know that's your feeling.

6                   **DEFENDANT BROWN:** I'm ready Monday, your  
7 Honor. I'm ready.

8                   **THE COURT:** Okay.

9                   **DEFENDANT BROWN:** I will be my own defense  
10 attorney. Like you told me before, if I fire him, then I  
11 have to represent myself, and I'm willing to do that if  
12 he's not ready because I'm ready. If he not ready, I'm  
13 ready.

14                   **THE COURT:** Okay.

15                   **DEFENDANT BROWN:** Trial goes Monday. I'm  
16 here.

17                   **THE COURT:** That's the plan.

18                   **DEFENDANT BROWN:** I'm ready.

19                   **THE COURT:** So Mr. Feinberg will be thinking  
20 about how he handles -- which is not an easy question, and  
21 it's concern that you get a fair trial, not just a trial.

22                   **DEFENDANT BROWN:** I'm not trying to get push  
23 back, your Honor.

24                   **THE COURT:** Okay.

25                   **MR. H. SCHARG:** Judge, one more thing.

1                   **THE COURT:** Yes.

2                   **MR. H. SCHARG:** Earlier on the severance  
3 motion, I asked for an instruction regarding separate  
4 defendants, same trial.

5                   **THE COURT:** Yes.

6                   **MR. H. SCHARG:** Will you give that in the  
7 preliminary instructions?

8                   **THE COURT:** Yes.

9                   **MR. H. SCHARG:** You didn't confirm or deny  
10 that.

11                   **THE COURT:** If I didn't, I intend to. I will  
12 incorporate that.

13                   **MR. H. SCHARG:** Thank you.

14                   **THE COURT:** Okay what else, if anything?

15                   **MR. DALY:** There were two matters left on  
16 motions in limine that I won't -- will not argue one of  
17 them. I think it as been resolved. I was seeking to  
18 suppress prior convictions. The judgment, it appears the  
19 government has agreed will not introduce in their case in  
20 chief, unless they feel it is necessary, at which point  
21 they will bring it to the Court's attention, and we can  
22 deal with it then. That's essentially what we agreed to.

23                   **MS. FINOCCHIARO:** That's correct, your Honor.

24                   **THE COURT:** Okay.

25                   **MR. DALY:** So the last part has to do with

1 401 and 403 arguments, about the overt acts, and there  
2 were a number that were listed there. I'm not going to  
3 argue each and every one. It was 71, 72, 94, 95, 100 and  
4 103, and I believe the government agreed not to introduce  
5 evidence on 103. So that's done.

6 I'm not going to go through all of those. You've  
7 read the briefs, Judge. I will rely on my briefs. You  
8 can either rule on the record or a written order. Thank  
9 you.

10 **THE COURT:** Thank you. Anything further from  
11 the government side?

12 **MR. SLOAN:** No.

13 **THE COURT:** 103, you're in agreement?

14 **MR. SLOAN:** That's right, your Honor.

15 **THE COURT:** Mr. Daly, do you wish that I to  
16 this on the record.

17 **MR. DALY:** No, I don't.

18 **THE COURT:** All right. And you're asking  
19 have a conference with the Court and government counsel,  
20 is that right?

21 **MR. DALY:** Yes, and Mr. Spielfogel. He's  
22 waiting for conference call.

23 **THE COURT:** Okay. Well, if nothing else,  
24 we'll break for day.

25 **MR. H. SCHARG:** Should we stay around?

1                   **THE COURT:** Is it going to affect you, do you  
2 think? Might it affect the others?

3                   **MR. DALY:** Depending on what you decide.

4                   **MR. H. SCHARG:** We'll stick around.

5

6                   (Proceedings concluded.)

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C E R T I F I C A T I O N

I, Ronald A. DiBartolomeo, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

s/Ronald A. DiBartolomeo  
Ronald A. DiBartolomeo, CSR  
Official Court Reporter

\_\_\_\_\_  
Date

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